

BAN LIAN HARDWARE SDN BHD

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v.

USACO MANUFACTURING (M) SDN BHD

HIGH COURT MALAYA, JOHOR BAHRU

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ABDUL WAHAB PATAIL J

[CIVIL SUIT NO: 22-239-1998]

20 AUGUST 2001

CIVIL PROCEDURE: *Service - Service on firm of solicitors - Whether sufficient - Whether complied with O. 45 r. 7(3)(a) and (b) Rules of the High Court 1980 - Whether O. 45 r. 7(4) applicable - Whether service presumed to have been dispensed with - Rules of the High Court 1980, O. 45 r. 7(7)*

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The plaintiff in this case failed to deliver a document of title to the defendant within 30 days of the defendant's payment as stipulated in the consent order. Thus, leave was obtained by the defendant against the plaintiff and its director. This present action was a notice of motion filed by the director of the plaintiff company, Sim Hsio Chor for orders to set aside or strike out the order obtained *ex parte* by the defendant granting leave to the latter to commence committal proceedings against him. At the commencement of the hearing, counsel for the parties agreed to be heard on two preliminary issues of non-compliance with Rules of the High Court 1980 ('RHC').

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The issues were: (1) for the reason that a copy of the sealed order obtained pursuant to the order recorded by consent has been served only upon the solicitors for the plaintiff, and even so only on 24 March 2001, that is, after the *ex parte* application for leave to commence committal proceedings was obtained on 16 March 2001, thus O. 45 r. 7(3)(a) and (b) RHC had not been complied with; and (2) the fundamental rule of natural justice and fairness is that if a person is to be liable to a penal sanction for the failure to do an act in a civil matter, he must be given notice that there is intention to resort to such penal sanction, thus there was non-compliance with O. 45 r. 7(4) RHC.

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Held:

[1] The plain and literal meaning of the words "shall not be enforced ... unless" found in O. 45 r. 7(3) RHC was that enforcement could not be made until the conditions were met, which in the context of the order for leave against the director, Sim Hsio Chor, meant that the consent order must be served personally upon him.

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- a* [2] The copy of the order was served only upon the solicitors for the plaintiff company. Service upon the plaintiff's solicitor was not personal service upon Sim Hsio Chor who was a director, unless there was evidence that the solicitor was also the solicitor for the said director at the relevant time and had been authorised to accept service on behalf of the director.
- b* Because a company and a director are separate legal entities whose interests are not necessarily congruent, it cannot be assumed that the solicitor for the company was necessarily the solicitor for the director also, or that if the company had authorised the solicitor to accept service, it does not necessarily mean that the director had also given such authority in respect of himself.
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- [3] Order 45 r. 7(4) relates to service upon a person on behalf of a company and not to an officer such as a director for the purposes of a proceeding against him. It was not directly applicable to the matter before this court.
- d* [4] Since service could not be presumed to have been dispensed with under O. 45 r. 7(7), the failure to serve a copy of the consent order between the defendant and the plaintiff upon Sim Hsio Chor, the defendant had failed to comply with O. 45 r. 7(3)(a).
- e* [5] It was not disputed that pursuant to the consent order between the plaintiff and the defendant on 22 August 2000, the defendant had complied and made payment on 25 August 2000. Hence it would follow also that service of the sealed order on 24 March 2001 means failure to serve a copy of the sealed order upon the plaintiff before the expiration of the 30 days from the time the defendant made payment and the defendant had therefore
- f* failed to comply with O. 45 r. 7(3)(b) and O. 45 r. 7(4).

[Leave to commence committal proceedings set aside with costs.]

Case(s) referred to:

Yusoff Kassim v. PP [1992] 3 CLJ 1535; [1992] 1 CLJ (Rep) 376 (*refd*)

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Legislation referred to:

Rules of the High Court 1980, O. 45 rr. 7(3)(a), (b), (4)(b), (7), O. 62 rr. 1(1), 3(b)

For the applicant/plaintiff - WJ Chen; M/s WJ Chen & Co

For the respondent/defendant - Ibrahim Hashim (Hassan Ibrahim); M/s Hassan

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Ibrahim & Co

Reported by Suhainah Wahiduddin

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JUDGMENT

Abdul Wahab Patail J:

The notice of motion at encl. 14R is an application by Sim Hsio Chor for orders to set aside or strike out an order obtained *ex parte* on 16 March 2001 by the defendant granting leave to the latter to commence committal proceedings against Sim Hsio Chor, a director of the plaintiff company, and costs.

The relevant chronology, pertinent to this application is as follows:

- i) The plaintiff and the defendant had agreed and caused to be recorded a consent order on 22 August 2000 as follows:

DENGAN SETUJU DIPERINTAHKAN bahawa Defendan membayar kepada Plaintiff wang berjumlah RM340,000.00 DAN ADALAH JUGA DENGAN SETUJU DIPERINTAHKAN bahawa Plaintiff, dalam 30 hari selepas penerimaan wang RM340,000.00 tersebut, menghantar serah kepada Defendan Suratan Hakmilik Asal bagi tanah yang terkandung dalam DAN ADALAH SELANJUTNYA DENGAN SETUJU DIPERINTAHKAN bahawa kecuali pembayaran di atas, tuntutan Plaintiff terhadap Defendan dana (sic) tuntutan balas Defendan terhadap Plaintiff kedua-duanya sama sekali dibatalkan, DAN ADALAH TERAKHIRNYA DENGAN SETUJU DIPERINTAHKAN bahawa Plaintiff dan Defendan menanggung kos sendiri masing-masing.

- ii) It is not disputed that the defendant had complied with the order and made payment on 25 August 2000 of the sum of RM340,000 due under the said consent order.
- iii) The plaintiff failing to deliver the document of title to the defendant within 30 days of the payment as stipulated in the consent order, leave was obtained on 16 March 2001 by the defendant to commence committal proceedings against the plaintiff and Sim Hsio Chor. The order granting that leave is worded as follows:

ATAS PERMOHONAN Defendan yang difailkan melalui *Ex parte* Notis Usul Untuk Kebenar (sic) yang bertarikh 15.12.2000, (Kandungan 30) AND (sic) SETELAH MEMBACA Afidavit yang diikrarkan oleh Ng Kok Eng pada 15.12.2000 dan Kenyataan yang bertarikh 15.12.2000, kedua-dua difailkan dalam tindakan ini DAN SETELAH (sic) MENDENGAR En. Chen Wai Jiun, Kounsel (sic) bagi pihak Defendan, *ex parte* ADALAH PADA HARI INI DIPERINTAHKAN bahawa Defendan dibenarkan untuk memulakan prosiding komital terhadap Plaintiff yang dinamakan diatas dan seorang pengarah syarikat Plaintiff yang bernama SIM HSIO CHOR (K/P 510409-01-5495/4261351) kerana telah melakukan

- a* kesalahan penghinaan terhadap Mahkamah berkenaan dengan suatu Penghakiman Bersetuju yang bertarikh 22hb Ogos 2000 dan direkodkan dalam tindakan ini.
- b* iv) The sealed order obtained pursuant to the order recorded by consent was served upon the then solicitors for the plaintiff on 24 March 2001, that is, after the *ex parte* application for leave to commence committal proceedings was obtained on 16 March 2001.
- At the commencement of the hearing before me, counsel for the parties agreed to be heard on two preliminary issues of non-compliance with the Rules of the High Court 1980:
- c* 1) non-compliance with O. 45 r. 7(3)(a) and (b); and
2) non-compliance with O. 45 r. 7(4)(b).
- d* It was submitted for Sim Hsio Chor that for the reason that a copy of the sealed order obtained pursuant to the order recorded by consent has been served only upon the then solicitors for the plaintiff, and even so only on 24 March 2001, that is, after the *ex parte* application for leave to commence committal proceedings was obtained on 16 March 2001, O. 45 r. 7(3) had not been complied with.
- e* Order 45 r. 7(3) provides:
- (3) Subject as aforesaid, an order requiring a body corporate to do or abstain from doing an act shall not be enforced as mentioned in r. 5(1)(ii) or (iii) unless:
- f* (a) a copy of the order has been served personally on the officer ... against whom an order for committal is sought; and
(b) in the case of an order requiring the body corporate to do an act, the copy has been so served before the expiration of the time within which the body was required to do the act.
- g* The plain and literal meaning of the words “shall not be enforced ... unless” is that enforcement cannot be made until the conditions are met, which in the context of the order for leave against the director Sim Hsio Chor means that the consent order must be served personally upon him. The specific provision
- h* that it be served upon him personally means that it must be served upon him personally by leaving a copy with him and if so requested by him, at the same time showing him also an office copy (see O. 62 r. 1(1) and O. 62 r. 3(b)).
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The reasons are obvious: the original order sought to be enforced is obtained against the company and not the director, and it is a fundamental rule of natural justice and fairness that if a person is to be liable to a penal sanction for the failure to comply with a court order to do or abstain from an act, he must be given notice of that order. **a**

The copy of the order was served only upon the solicitors for the plaintiff company. Service upon the plaintiff's solicitor is not personal service upon Sim Hsio Chor who is a director, unless there is evidence that the then solicitor is also the solicitor for the said director at the relevant time and has been authorised to accept service on behalf of the director. Because a company and a director are separate legal entities whose interests are not necessarily congruent, it cannot be assumed that the solicitor for the company is necessarily the solicitor for the director also, or that if the company had authorised the solicitor to accept service, it necessarily means that the director had also given such authority in respect of himself. **b**

It was submitted for Sim Hsio Chor that there was non-compliance with O. 45 r. 7(4) also. The rule provides: **c**

- (4) There must be indorsed on the copy of an order served under this rule a notice in Form 87 informing the person on whom the copy is served: **d**
- (a) ... **e**
- (b) in the case of an order requiring the body corporate to do an act, the copy has been so served before the expiration of the time within which the body was required to do the act.

Order 45 r. 7(4) reflects the fundamental rule of natural justice and fairness that if a person is to be liable to a penal sanction for the failure to do an act in a civil matter, he must be given notice that there is intention to resort to such penal sanction. Order 45 r. 7(4) however relates to service upon a person on behalf of a company and not to an officer such as a director for the purposes of a proceeding against him. It is not directly applicable to the matter before this court in this application. **f**

Counsel for the defendant had submitted that O. 45 r. 7 is applicable, and that the court had dispensed with service. The said rule provides: **g**

- (7) Without prejudice to its powers under Order 62 rule 5, the Court may dispense with service of a copy of an order under this rule if it thinks it just to do so. **h**

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- a* He submitted that the matter of non-service of the order was addressed in submissions to the court, and leave had been granted. Perusing the order of 16 March 2001, it is clear that there is no order dispensing with service of the order of 22 August 2000. Counsel conceded in submission that there is nothing in the order obtained on 16 March 2001 of a decision *per se* to dispense with service of the order of 22 August 2000 upon Sim Hsio Chor.
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- c* In *Yusoff Kassim v. PP* [1992] 3 CLJ 1535, Edgar Joseph Jr SCJ, in delivering the judgment of the Supreme Court, held that an appellate court should presume that the trial judge had failed to take into account certain facts favourable to the accused, where such facts had been omitted in the grounds of judgment supplied to the solicitors of the appellants some four years after the notice of appeal had been lodged. The principle that may be derived is that if a matter is not stated in a ground of judgment or in an order, it cannot be presumed to have been considered, or in the case of an order, to have been included as part of the order. Indeed this is particularly so of orders of court
- d* since they are fairied by the party obtaining it before a sealed copy is extracted from the court. Having had the opportunity of fairing the order and ensuring it is accurate, there is no basis to seek to infer that the court had dispensed with service when such order is not so recorded. In any case that leave is granted does not necessarily mean that the court had in fact dispensed with service since the other party might waive the objection, but in the event
- e* objection is made, then the interpretation that must be given is that the court had not dispensed with service.

- Since service cannot be presumed to have been dispensed with under O. 45 r. 7(7), the failure to serve a copy of the consent order of 22 August 2000
- f* between the defendant and the plaintiff upon Sim Hsio Chor, the defendant had failed to comply with O. 45 r. 7(3)(a). It would follow also that service of the sealed order on 24 March 2001 means failure to serve a copy of the sealed order upon the plaintiff before the expiration of the 30 days from the time the defendant made payment, and the defendant had therefore failed to
- g* comply with O. 45 r. 7(3)(b) and O. 45 r. 7(4).

- What must be kept in proper perspective is that the law proceeds on the basis that a party will comply with a judgment or order. But the law also provides that in the event a party does not comply with a judgment or order, then steps to enforce may be taken. Such steps are called execution proceedings. Since
- h* a sealed order settles and sets out the precise orders of the court, a sealed order is the essential basis of enforcement proceedings. Although the committal

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proceeding is one of the forms of enforcement proceedings, its penal nature requires strict compliance with the preconditions, and the precondition that a copy of the order is served upon the party against whom the committal is sought is for the very elementary reason that his *mens rea* not to comply with the order must be established beyond reasonable doubt.

Leave to commence committal proceedings is set aside with costs.

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